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Nos. 14-556, 14-562, 14-571, 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Brief of *Amici Curiae* Religious Organizations, Public Speakers, and Scholars Concerned About Free Speech in Support of Respondents

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Buckley v. Valeo,
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Burwell v. Hobby Lobby Stores, Inc.,
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Citizens United v. FEC,
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City of L.A. v. Alameda Books,
535 U.S. 425 (2002) . 14

Cohen v. California,
403 U.S. 15 (1971) . . . 15

Denver Area Educ. Telcoms. Consortium v. FCC,
518 U.S. 727 (1996) . . 15

Hill v. Colo.,
530 U.S. 703 (2000) . . . 15, 18

Int'l Soc'y for Krishna Consciousness v. Lee,
505 U.S. 672 (1992) 18

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 17

Trinity W. Univ. v. NSBS,
2015 NSSC 25 (Can.) . . . 29

Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994) . . 14, 16

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) . . 16

Virginia v. Hicks,
539 U.S. 113 (2003) 15, 18

CONSTITUTION

U.S. amend. I *passim*

OTHER AUTHORITIES

Acts 6:8-7:60 . . 11

Acts 16:16-25 11

Acts 19:23-34 11

Alliance Defending Freedom, *EMU Student Achieves Final Victory After Court Rules "Tolerance is a Two-Way Street,"* http://www.alliancedefendingfreedom.org/News/PRDetail/141 (Dec. 10, 2012) . 24

Alliance Defending Freedom, *Fire Chief Sues City of Atlanta*, http://www.adfmedia.org/News/PRDetail/9520 (Feb. 18, 2015) . . . 21

Alliance Defending Freedom, *Houston, We Have A Problem*, http://blog.alliancedefendingfreedom.org/2014/10/15/houston-we-have-a-problem-and-a-constitution/ (October 15, 2014) . 26

Alliance Defending Freedom, *MSU Quickly Settles Lawsuit*, http://www.adfmedia.org/News/PRDetail/1430 (Nov. 13, 2006) 25

A Public Statement, *Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POLITICS (April 22, 2014), http://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html . . . 19

Patrick Craine, *Bishop obeys gov't order to remove Catholic school teaching on sinfulness of homosexual acts*, LIFE SITE NEWS (October 18, 2013), https://www.lifesitenews.com/news/bishop-obeys-govt-order-to-remove-catholic-school-teaching-on-sinfulness-of . . . 29

CITS-TV *re Word.ca* and *Word TV*, CBSC Decision 08/09-2142 & 09/10-0383+ (Decided June 22, 2010) 30

DOJ Pride, "LGBT Inclusion at Work: The 7 Habits of Highly Effective Managers," http://www.lc.org/media/9980/images/pr_doj_lgbt_directive_052113.pdf . . 28

Steve Doughty, *Christians ARE Too Scared to Admit Beliefs – Because they Fear Being Mocked or Treated like Bigots, say Equality Chiefs*, THE DAILY MAIL (March 11, 2015), http://www.dailymail.co.uk/news/article-2990678/Christians-scared-admit-beliefs-fear-mocked-treated-like-bigots-say-equality-chiefs.html . 31

Genesis 1:27 . . . . . 12, 27

Liberty Institute, *Distinguished Public Health Official Denied Post*, https://www.libertyinstitute.org/walsh (Sep. 23, 2014) . 22

Liberty Institute, https://libertyinstitute.org/pages/issues/in-the-public-arena/liberty-institute-defends-airman-persecuted-for-his-faith (October 12, 2013) . . . 23

Liberty Institute, *Navy Threatened to End Career of Chaplain*, https://www.libertyinstitute.org/modderfacts (March 18, 2015) 20

Jaan Lilles, *Nova Scotia Barristers Society without Jurisdiction to refuse Trinity Western University grads*, LEXOLOGY (March 5, 2015), http://www.litigate.com/nova-scotia-barristers-society-without-jurisdiction-to-refuse-twu-grads . . . 29

Mark 6:14-29 . . 11

Mark 10:6 27

Mark 10:6-8 12

Matthew 14:1-12 11

J. Milton, *Areopagitica* (1644) . . . 13

Pew Research Center, *U.S. Religious Landscape Survey*, (February 2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf 16

Bill Scaggs, "Including Sexual Orientation and Gender Identity in Diversity," U.S. Dep't of Agriculture (Jan. 2010), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_015573.pdf 27

Mags Storey, *CTS Drops McVety Over Controversial Remarks*, CHRISTIAN WEEK (MARCH 1, 2011), www.christianweek.org/cts-drops-mcvety-over-controversial-remarks/ 30

Tertullian, *De idolatria* (J.H. Waszink and J.C.M. Van Winden eds., E.J. Brill 1987) (ca. 197-208) 11

U.S. Office of Personnel Management, "Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace," http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ 27

Kris Wells, *Poisoning the School Environment*, The Alberta Teachers' Association, www.teachers.ab.ca/Publications/ATAMagazine/Volume2086/Number203/Articles/Pages/PoisoningtheSchoolEnvironment.aspx 30

Hilary White, *UK Gvmt to Faith Schools: Promote Homosexuality and Other Religions or Face Closure*, LIFE SITE NEWS (February 2, 2015), https://www.lifesitenews.com/news/uk-gvmt-to-faith-schools-promote-homosexuality-and-other-religions-or-face 30, 31

INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations, public speakers, and scholars who support the First Amendment free speech rights of Christian ministers, teachers, and leaders who are compelled by faith and conscience to preach and speak aloud their millennia-old and sincerely held religious view that marriage is the sacred union of one man and one woman.

MINISTRIES

National Religious Broadcasters ("NRB") is a non-partisan international association of Christian broadcasters and communicators united by purpose and message: to proclaim the Good News of eternal life through Jesus Christ; to transform culture through the application of sound biblical teaching; and to advance biblical truth, to promote media excellence, and to defend free speech. NRB reaches every continent through Christian radio, television, internet, and other media arts. NRB members hold deep-rooted beliefs that religious liberty is the cornerstone of a free society, and that we must protect those freedoms so that the transforming reality of Jesus Christ can reach hearts and minds the world over. NRB also works to protect access to the world's electronic and digital media, ensuring that the Gospel goes out unimpeded to reach the four corners of the earth.

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[1] All parties of record consented to the filing of this *amicus* brief. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

The **Billy Graham Evangelistic Association** ("BGEA"), founded in 1950 by Billy Graham, proclaims the Gospel of Jesus Christ throughout the world by every effective means available. From its headquarters in Charlotte, N.C., the BGEA directs a wide range of domestic and international ministries, including large-scale festivals led by evangelists Franklin Graham and Will Graham; the Billy Graham Rapid Response Team of crisis-trained chaplains; *My Hope* national evangelism outreach projects; The Billy Graham Library in Charlotte, N.C.; The Billy Graham Training Center at The Cove in Asheville, N.C.; *SearchforJesus.net,* an Internet evangelism project reaching thousands of people for Christ online; and many others through print, television, telephone, radio and the Internet. BGEA's ministry is based on its statement of faith, which states, in part, that "God instituted monogamous marriage between male and female as the foundation of the family and the basic structure of human society. For this reason, we believe that marriage is exclusively the union of one genetic male and one genetic female."

In Touch Ministries ("ITM") is a Christian non-profit ministry founded by Dr. Charles Stanley in 1972. Today, "In Touch with Dr. Charles Stanley" is broadcast around the world via radio, television, podcasts, and the Internet, reaching over 1,200 radio and television outlets in more than 50 languages. ITM also produces books, studies, discipleship resources, and the award-winning *In Touch* magazine to more than 1.5 million households every month. The mission of ITM is to "lead people worldwide into a growing relationship with Jesus Christ and to strengthen the local church."

Samaritan's Purse is a nondenominational evangelical Christian organization providing spiritual and physical aid to hurting people around the world. Since 1970, Samaritan's Purse has helped meet needs of people who are victims of war, poverty, natural disasters, disease, and famine with the purpose of sharing God's love through His Son, Jesus Christ. Samaritan's Purse serves in over 100 countries to combat human trafficking, fight Ebola, provide access to clean water, provide crisis relief through food and shelter programs, and touch the lives of millions of children through Operation Christmas Child. Samaritan's Purse bases its ministry on its Statement of Faith, which in part declares that "God instituted monogamous marriage between male and female as the foundation of the family and the basic structure of human society. For this reason, we believe that marriage is exclusively the union of one genetic male and one genetic female."

Pathway to Victory ("PTV") is the broadcast ministry of Dr. Robert Jeffress. PTV empowers Christians worldwide, through radio, television, and online programming, to walk in newness of life. PTV seeks to satisfy the spiritual hunger of seasoned believers while also reaching those who do not know Christ. More than 700 radio stations in the United States broadcast the daily radio program, while Daystar, a Christian television network, airs PTV both in the United States and internationally. PTV's mission is "to provide practical application of God's Word to everyday life through clear, Biblical teaching." PTV's goal is "to lead people to become obedient and reproducing disciples of Jesus Christ, as He commanded in Matthew 28:18–20."

The **Chuck Colson Center for Christian Worldview** (the "Colson Center"), founded by Chuck Colson, seeks to build a movement of Christians committed to living and defending the Christian worldview. The Colson Center applies sound Christian worldview thinking to the key issues of the day through its website, online newsletters, and radio programs such as "BreakPoint" with Eric Metaxas and John Stonestreet, "The Point" with John Stonestreet, and the half-hour weekend interview show "BreakPoint this Week."

SEMINARIES

Dallas Theological Seminary ("DTS") is an evangelical seminary whose mission is "to glorify God by equipping godly servant-leaders for the proclamation of His Word and the building up of the body of Christ worldwide," or, more simply, to "Teach Truth. Love Well." Since its founding in 1924, many of DTS's alumni have gone on to notable professions preaching, teaching, and writing about their deeply-held religious beliefs that marriage is the union of one man and one woman.

The Southern Baptist Theological Seminary ("SBTS"), founded in 1859, is the flagship school of the Southern Baptist Convention and one of the largest seminaries in the world. The mission of SBTS "is to be totally committed to the Bible as the Word of God, to the Great Commission as our mandate, and to be a servant of the churches of the Southern Baptist Convention by training, educating, and preparing ministers of the gospel for more faithful service." For more than 150 years, SBTS has braced the winds of

theological and intellectual change by standing firmly upon the confessional vision of the school's founding faculty. SBTS has students from all fifty states and forty-one counties.

Southeastern Baptist Theological Seminary ("SEBTS") is a seminary of the Southern Baptist Convention and trains Great Commission-minded ministers of the Gospel. SEBTS was founded in Wake Forest, North Carolina in 1950. The mission of SEBTS is "to glorify the Lord Jesus Christ by equipping students to serve the church and fulfill the Great Commission (Matthew 28:18–20)."

PUBLIC SPEAKERS & SCHOLARS

Dr. Daniel L. Akin is President of and Professor of Preaching and Theology at Southeastern Baptist Theological Seminary. Dr. Akin received his Bachelor of Arts from The Criswell College, a Master of Divinity from Southwestern Baptist Theological Seminary, and a Doctorate of Philosophy from the University of Texas at Arlington. He is editor of The Christ Centered Exposition commentary series.

Dr. Mark L. Bailey is President of Dallas Theological Seminary and Professor of Bible Exposition. Dr. Bailey received his Bachelor of Arts from Southwestern College, his Master of Divinity and Master of Theology from Western Conservative Baptist Seminary, and his Doctorate of Philosophy in Bible Exposition from Dallas Theological Seminary. Dr. Bailey has written numerous articles and books, including *To Follow Him: The Seven Marks of a Disciple* and *Nelson's New Testament Survey: Discovering the Essence,*

Background & Meaning About Every New Testament Book.

Dr. Francis J. Beckwith is a professor of philosophy, and associate director of the philosophy graduate program, at Baylor University. An expert in church-state issues, Dr. Beckwith is the author of more than a dozen books including *To Everyone An Answer: A Case for the Christian Worldview* (IVP); *Politics for Christians: Statecraft As Soulcraft* (IVP); and the forthcoming *Taking Rites Seriously: Law, Politics, and the Reasonableness of Faith* (Cambridge University Press). He served as the 57th president of the Evangelical Theological Society and was a member of the American Philosophical Association's Committee on Philosophy and Law.

Dr. Robert A.J. Gagnon is an associate professor of New Testament at Pittsburgh Theological Seminary. He writes and teaches on moral and social issues, including the issue of same-sex marriage. Dr. Gagnon obtained his Bachelor of Arts from Dartmouth College, his Master of Theological Studies from Harvard Divinity School, and his Doctorate of Philosophy from Princeton Theological Seminary. He is a member of the Society of Biblical Literature and an ordained elder in the Presbyterian Church (USA). Dr. Gagnon has been quoted in or written for *The New York Times,* NPR, CNN, and *Christianity Today*. He authored several works, including *The Bible and Homosexual Practice: Texts and Hermeneutics.*

Dr. Robert Jeffress is the senior pastor of the 11,000-member First Baptist Church, Dallas, Texas, and an adjunct professor at Dallas Theological Seminary. Dr. Jeffress has made more than 1,500 guest appearances

on radio and television programs such as Fox News Channel's "Fox and Friends," "The O'Reilly Factor," and "Cavuto on Business;" ABC's "Good Morning America;" CBS's "This Morning;" HBO's "Real Time with Bill Maher;" CNN's "Anderson Cooper 360;" and MSNBC's "Hardball with Chris Matthews." Dr. Jeffress hosts the daily Pathway to Victory radio program, appears on a weekly television program that is broadcast on 1,200 television stations throughout the nation, and is the author of 21 books.

Dr. Byron R. Johnson is Baylor University's Distinguished Professor of the Social Sciences, founding director of the Institute for Studies of Religion, and director of the Program on Prosocial Behavior. Dr. Johnson recently completed a series of empirical studies for the Department of Justice on the role of religion in prosocial youth behavior, and served as a Presidential appointment to the Coordinating Council for Juvenile Justice and Delinquency Prevention. He has been project director / principal investigator on many grants from private foundations as well as federal agencies including the Department of Justice, Department of Defense, U.S. Institute of Peace, Department of Labor, and the National Institutes of Health. Before joining the faculty at Baylor University, Dr. Johnson also directed research centers at Vanderbilt University and the University of Pennsylvania. Dr. Johnson was also the 2013 Big Brother of the Year for Big Brothers Big Sisters Texas Lone Star.

Eric Metaxas is the *New York Times* #1 bestselling author of *Bonhoeffer* and *Amazing Grace: William Wilberforce and the Heroic Campaign to End Slavery*.

Along with his colleague John Stonestreet, Metaxas is the voice of BreakPoint, a radio commentary that is broadcast on 1,400 radio outlets with an audience of eight million. Mr. Metaxas was also the keynote speaker at the 2012 National Prayer Breakfast and is the 2011 recipient of the Canterbury Medal awarded by the Becket Fund for Religious Freedom. A graduate of Yale University, Mr. Metaxas served as editor of the *Yale Record,* the nation's oldest college humor magazine. He has also written essays, reviews, poetry, and humor writing that has appeared in the *Atlantic Monthly, The New York Times, The Washington Post, Christianity Today, National Review,* and *First Things.* Woody Allen has described Mr. Metaxas' humor writing as "quite funny." Mr. Metaxas has also written numerous children's books and worked as a writer for VeggieTales, a children's animated series. Mr. Metaxas has appeared on CNN, MSNBC, the Fox News Channel, the History Channel, C-Span's Book TV, Glenn Beck, Huckabee, and NPR's "Morning Edition" and "Talk of the Nation."

Dr. Albert Mohler, Jr., is President of The Southern Baptist Theological Seminary, the flagship school of the Southern Baptist Convention and one of the largest seminaries in the world. Dr. Mohler has been recognized by publications such as *Time* and *Christianity Today* as a leader among American evangelicals. Time.com called Dr. Mohler the "reigning intellectual of the evangelical movement in the U.S." Dr. Mohler is widely sought as a columnist and commentator. He has been quoted in the nation's leading newspapers, including *The New York Times, The Wall Street Journal, USA Today, The Washington Post, The Atlanta Journal/Constitution,* and *The*

Dallas Morning News. He has also appeared on CNN's "Larry King Live," NBC's "Today Show" and "Dateline NBC," ABC's "Good Morning America," PBS's "The NewsHour with Jim Lehrer," MSNBC's "Scarborough Country," and Fox's "The O'Reilly Factor." Dr. Mohler is also the Joseph Emerson Brown Professor of Christian Theology at Southern Seminary. He has authored several books and is the editor-in-chief of *The Southern Baptist Journal of Theology*.

Dr. Charles F. Stanley is the senior pastor of First Baptist Atlanta, founder and president of In Touch Ministries, former president of the Southern Baptist Convention, and a *New York Times* best-selling author. Dr. Stanley provides Christ-centered, biblically-based principles for everyday life to millions of people around the world through his television and radio ministry.

John Stonestreet is a speaker and fellow of the Chuck Colson Center for Christian Worldview and is senior content advisor for Summit Ministries. Mr. Stonestreet is co-host, with Eric Metaxas, of BreakPoint, the Christian worldview radio program founded by Chuck Colson. Mr. Stonestreet also appears on The Point, a daily national radio feature on worldview, apologetics, and cultural issues.

Dr. Owen Strachan is president of the Council on Biblical Manhood and Womanhood, assistant professor of Christian Theology and Church History at The Southern Baptist Theological Seminary and Boyce College, and director of the Carl F. H. Henry Institute for Evangelical Engagement at SBTS. Dr. Strachan has written seven books and will publish three more in 2015: *The Colson Way, Reawakening the Evangelical Mind,* and *The Pastor as Public Theologian.*

SUMMARY OF ARGUMENT

Unfortunately, in their zeal to advance and affirm same-sex marriage, many state actors have ignored or violated the very free speech principles that facilitated free and open dialogue on this once-settled question. As a cautionary tale of a road to potential tyranny, this brief details many incidents — personal and systemic; domestic and foreign — where religious dissenters from same-sex marriage have been silenced by state actors and thereby denied access to the marketplace of ideas.

A decision from this Court imposing same-sex marriage nationwide would inevitably exacerbate these conflicts, and inexorably result in additional violations of free speech rights. And that — in addition to all of the reasons provided by the respondents and their other *amici* — is a powerful reason to affirm the Sixth Circuit. In reaching its decision, this Court should reaffirm that the Free Speech Clause of the First Amendment protects religious dissenters who disagree with state recognized same-sex marriage and to reaffirm the importance of free debate and free inquiry in this democratic Republic.

ARGUMENT

I. For over twenty centuries, the universal Christian church has included followers of Jesus Christ who spoke and preached on controversial issues in ways that offended powerful forces in society.

John the Baptist was imprisoned and subsequently beheaded because he spoke against King Herod's marriage to Herodias. *Matthew* 14:1-12; *Mark* 6:14-29. Stephen the Martyr was arrested by the Sanhedrin and subsequently stoned to death when he refused to stop preaching that Jesus of Nazareth was the Messiah. *Acts* 6:8-7:60. The Apostle Paul and disciple Silas were flogged and imprisoned because they preached "customs unlawful for [] Romans to accept or practice." *Acts* 16:16-25. The Apostle Paul was threatened with expulsion from Ephesus because he preached against the Cult of Artemis, infuriating silversmiths who made a "good income" selling Artemis shrines. *Acts* 19:23-34. Tertullian refused to dilute his teachings against the making and refurbishing of pagan idols — again, to the great consternation of silversmiths, guilds, and magistrates who profited from the civic religion of the Roman Empire. Tertullian, *De idolatria* 28 (J.H. Waszink and J.C.M. Van Winden eds., E.J. Brill 1987) (ca. 197-208) ("*Vivere ergo habes?*" ("Must you live?")). In summary, for more than 2,000 years, individual Christians have refused to keep quiet about their sincere religious beliefs and have not flinched at speaking "truth to power."

Same-sex marriage is not an exception to this historical rule. For two millennia, Christians have based their definition of marriage on the words of Jesus Christ, who incorporated by reference ancient words from the Book of Genesis:

> But from the beginning of creation, "God made them male and female." "Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh." So they are no longer two but one flesh.

Mark 10:6-8 (quoting *Genesis* 1:27). Consequently, individual Christian ministers, teachers, and leaders must continue to preach and speak aloud their millennia-old and sincerely held religious view that marriage is the sacred "one flesh" union of one man and one woman. If their sermons and words clash with the views of politically powerful groups or even Government orthodoxy on same-sex marriage, they will have no choice but to seek refuge in the First Amendment generally, and the Free Speech Clause specifically. A decision from this Court imposing same-sex marriage on the States would dramatically exacerbate this conflict between advocates of same-sex marriage and Christian ministers, teachers, and leaders, and would inevitably lead to untold violations of the latter's First Amendment free speech rights.

II. The freedom to speak according to religious conscience is essential to the dignity of each person and to the stability of our self-governing Republic.

This Nation has long strived to give effect to John Milton's plea, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." J. Milton, *Areopagitica* (1644). "At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge." *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). The freedom to speak according to religious conscience serves at least two First Amendment purposes: the first is personal; the second is political.

First, as Justice Kennedy recently noted, freedoms of speech and religious conscience are foundational to human dignity and self-definition:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to *express* those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (emphasis added); *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.")

Second, the stability and survival of our self-governing Republic requires constant vigilance by conscientious citizens who will speak their minds, state their viewpoints, and seek to persuade their fellow man on controversial issues:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.

Citizens United, 558 U.S. at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976)) (internal citations omitted); *see also City of L.A. v. Alameda Books*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring in the judgment) ("Speech can produce tangible consequences:

It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech."); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 782–83 (1996) ("In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.'") (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). When a religious dissenter is intimidated into silence, the larger Republic is "deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

Finally, freedoms of speech and religious conscience are particularly important when there is a moral dimension to the question pending in the public square. "[S]peech makes a difference, as it must when acts of lasting significance and profound moral consequence are being contemplated." *Hill v. Colo.*, 530 U.S. 703, 790 (2000) (Kennedy, J., dissenting). By stating aloud their moral objections to the existing order — a peaceful yet powerful outlet for the marginalized — religious dissenters stabilize our diverse and pluralistic Republic. "In a free society protest serves to produce stability, not to undermine it." *Hill*, 530 U.S. at 787 (Kennedy, J., dissenting).

A decision from this Court imposing same-sex marriage on the States would necessarily undermine these settled norms, by placing federal Government policy on a collision course with the strongly held religious views of a large segment of the population — a segment that for deeply felt religious reasons would have no choice but to speak "truth to power."[2]

III. The Free Speech Clause is most needed when the religious dissenter's views are controversial and inconvenient.

Believing their cause is righteous, political victors are often tempted to silence their opponents using the tools of Government. The First Amendment stands athwart this potential tyranny. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)); *Turner Broad.*, 512 U.S. at 641 (1994) ("Government action that stifles speech on account of its message, or that requires the utterance

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[2] The vast majority of Abrahamic religious denominations — Protestant, Catholic, Evangelical, Jewish, Mormon — continue to define marriage as the sacred union of one man and one woman, including but not limited to the Roman Catholic Church, Eastern Orthodox Church, Presbyterian Church of America, Orthodox Presbyterian Church, Lutheran Church – Missouri Synod, Assemblies of God, Seventh-Day Adventist, Church of God in Christ, American Baptist Churches in the U.S.A., Church of Jesus Christ of Latter-day Saints, Rabbinical Council of America, and the Southern Baptist Convention. These denominations *alone* account for over 90 million Americans. Pew Research Center, *U.S. Religious Landscape Survey*, (February 2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

of a particular message favored by the Government, contravenes this essential right.").

When the Government attempts to silence controversial or inconvenient speech, the result is often viewpoint discrimination, a straight-line violation of the Free Speech Clause:

> In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.... When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (1995) (citations omitted). Moreover, even if the First Amendment ultimately vindicates a religious dissenter's right to speak, the Republic may be harmed by the silence of those who were too afraid to speak. *Id.* at 835 ("The second, and corollary, danger is to speech from the chilling of individual thought and expression.").

The Free Speech Clause was ratified to protect and keep open the "uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119. It is most needed when the religious dissenter's views are controversial and inconvenient to the Government. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 701 (1992) ("The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech.") (Kennedy, J., concurring); *Hill*, 530 U.S. at 787 ("Laws punishing speech which protests that lawfulness or morality of the government's own policy are the essence of tyrannical power the First Amendment guards against.") (Kennedy, J., dissenting).

Should this Court impose same-sex marriage on the States, those who have prevailed will likely attempt to silence religious dissenters who continue to hold to their millennia-old definition of marriage. That sad subject is discussed next.

IV. In the same-sex marriage debate, many high-profile religious dissenters have been actively silenced, while others are chilled into silence — thereby harming the marketplace of ideas.

Unfortunately, in their zeal to advance and affirm same-sex marriage, many advocates have ignored or violated the very free speech principles that facilitated free and open dialogue on this once-settled question. In a public statement published on *Real Clear Politics*, fifty-eight prominent supporters of same-sex marriage

— including Andrew Sullivan, Ken Mehlman, Eugene Volokh, Richard Epstein, and Stephen Calabresi — denounced this "worrisome turn toward intolerance and puritanism," noting that "a liberal society demands a culture that welcomes robust debate, vigorous political advocacy, and a decent respect for differing opinions."[3] However, such admonitions have been largely ignored by politically powerful advocates of same-sex marriage — and would be ignored even more routinely if this Court imposes same-sex marriage on the entire nation. Consequently, this Court should affirm the Sixth Circuit and allow the democratic dialogue to continue, thereby keeping open the marketplace of ideas to persons of goodwill on both sides.

A. State actors have silenced religious dissenters who dared speak aloud their views on marriage.

The following abstracts are representative, but not exhaustive, of the religious dissenters who have suffered harm for stating their sincere religious beliefs on marriage – even without a ruling from this Court imposing same-sex marriage on the States:

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[3] A Public Statement, *Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POLITICS (April 22, 2014), http://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html ("We strongly believe that opposition to same-sex marriage is wrong, but the consequence of holding a wrong opinion should not be the loss of a job.")

United States Navy
Chaplain Wes Modder

Facts: 19-year Marine Corps and Navy veteran who served (1) in Operations Desert Shield and Desert Storm, (2) as Force Chaplain for Navy Special Warfare Command assigned to support Navy SEALS in DEVGRU. During private counseling sessions and in response to questions from sailors, Chaplain Modder stated his sincere religious view that marriage and sexual relations are reserved to the sacred union of one man and one woman, in accord with his endorsing church, the Assemblies of God.

Government Response: Removed from promotion list, detached for cause (the equivalent of being terminated), and faces possible dishonorable discharge from the United States Navy.[4]

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[4] Liberty Institute, *Navy Threatened to End Career of Chaplain*, https://www.libertyinstitute.org/modderfacts (March 18, 2015).

Atlanta Fire Chief Kelvin Cochran

Facts: 30-year veteran firefighter appointed by (1) the Mayor of Atlanta to serve as Fire Chief and (2) President Obama to serve as the United States Fire Administrator. Chief Cochran authored and published a Christian devotional book that briefly stated his sincere religious belief that marriage and sexual relations are reserved to the sacred union of one man and one woman.

Government Response: Suspended for 30 days and terminated, despite evidence and testimony from colleagues and employees that he never once discriminated against any sexual minority.[5]

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[5] Alliance Defending Freedom, *Fire Chief Sues City of Atlanta*, http://www.adfmedia.org/News/PRDetail/9520 (Feb. 18, 2015).

Georgia Department of Public Health
Dr. Eric Walsh

Facts: Served as Public Health Director of the City of Pasadena, where he promoted AIDS outreach programs and funding. Hired to serve as the District Health Director for the State of Georgia Department of Public Health. As a lay pastor in a Seventh Day Adventist Church, Dr. Walsh preached sermons on his sincere religious belief that marriage and sexual relations are reserved to the sacred union of one man and one woman.

Government Response: Terminated after State of Georgia Department of Public Health officials reviewed his sermons on marriage. State officials left a voice message on Dr. Walsh's answering machine, which recorded their joking statement, "you're out!"[6]

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[6] Liberty Institute, *Distinguished Public Health Official Denied Post*, https://www.libertyinstitute.org/walsh (Sep. 23, 2014).

United States Air Force
Senior Master Sergeant Phillip Monk

Facts: 19-year veteran who served as First Sergeant at Lackland Air Force Base. When he investigated and determined that another instructor meant no harm in stating his opposition to same-sex marriage, the new Commanding Officer ordered Sergeant Monk to state whether persons who oppose same-sex marriage are violating laws against discrimination.

Government Response: When Sergeant Monk stated, "I cannot answer that question the way you want," the Commanding Officer relieved him of his duties as First Sergeant and reassigned him. When Sergeant Monk filed a religious discrimination claim, the Air Force alleged he had made a "false statement" and read him his (*Miranda*) rights.[7]

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[7] Liberty Institute, https://libertyinstitute.org/pages/issues/in-the-public-arena/liberty-institute-defends-airman-persecuted-for-his-faith (October 12, 2013).

Eastern Michigan University
Student Julea Ward

Facts: A devout Christian who enrolled in a graduate counseling program at Eastern Michigan University ("EMU"), a public university. During a practicum course, Mrs. Ward was assigned to a student who sought affirmation of his "same-sex relationship." Mrs. Ward sought permission to refer the student to another counselor, citing her religious belief that sexual relations are reserved to the sacred union of one man and one woman.

Government Response: EMU expelled Ward from the program after she refused to participate in a remediation program designed to "correct" her views on same-sex sexual conduct. [8]

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[8] Alliance Defending Freedom, *EMU Student Achieves Final Victory After Court Rules "Tolerance is a Two-Way Street,"* http://www.alliancedefendingfreedom.org/News/PRDetail/141 (Dec. 10, 2012).

Missouri State University
Student Emily Brooker

Facts: A devout Christian who enrolled in the School of Social Work at Missouri State University ("MSU"), a public university. As a class assignment, Ms. Brooker was required to write a letter to the Legislature lobbying for same-sex adoption rights. She refused, citing her sincere religious belief that marriage and sexual relations are reserved to the sacred union of one man and one woman, who serve as father and mother to their children.

Government Response: MSU charged Ms. Brooker with a "Level 3 Grievance," the most severe offense level available. The Ethics Committee interrogated her for several hours and she was later told that her degree may be withheld.[9]

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[9] Alliance Defending Freedom, *MSU Quickly Settles Lawsuit*, http://www.adfmedia.org/News/PRDetail/1430 (Nov. 13, 2006).

The Houston Five

Facts: The City of Houston added "gender identity" and "sexual orientation" to its non-discrimination ordinance without clear exemptions for churches and religious organizations. Prominent Houstonians organized a recall petition, including several pastors. The City invalidated the recall petition, giving rise to litigation. The pastors were not parties to the suit.

Government Response: The City of Houston subpoenaed five pastors, demanding production of their sermons, speeches, and writings on "gender identity," "homosexuality," and the mayor. In a tweet message, Mayor Annise Parker said, "their sermons are fair game."[10]

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[10] Alliance Defending Freedom, *Houston, We Have A Problem*, http://blog.alliancedefendingfreedom.org/2014/10/15/houston-we-have-a-problem-and-a-constitution/ (October 15, 2014.)

B. Through memoranda, manuals, and training materials, federal agencies have imposed speech codes on their employees, silencing or at least chilling religious dissenters.

The above-referenced cases and controversies represent the tip of iceberg. Below the waterline lies a mountain of memoranda, manuals, and training materials designed to enforce conformity of belief in the federal government's new sexual orthodoxy — or at least chill into silence any religious dissenters.

In 2010, the Department of Agriculture Special Emphasis Program listed the Defense of Marriage Act as an example of "heterosexism" and avoidance of LGBT "conversations" as an example of the pernicious "Lavender Ceiling."[11] The Office of Personnel Management's diversity reference manuals[12] require employees to use the pronoun that correlates to a transgendered person's "perceived gender," with no safeguards for religious dissenters who may believe "God made them male and female." *Mark* 10:6 ; *Genesis* 1:27. For these federal agencies, sexual identity ("who I am") absolutely trumps religious identity ("who I am").

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[11] Bill Scaggs, "Including Sexual Orientation and Gender Identity in Diversity," U.S. Dep't of Agriculture, 17 (Jan. 2010), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_015573.pdf (last viewed Mar. 18, 2015).

[12] U.S. Office of Personnel Management, "Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace," http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited Mar. 18, 2015).

In 2013, the Department of Justice affinity group DOJ Pride published a training guide listing "The Seven Habits of Highly Effective Managers." The document is an unabashed speech code:

> **DO** use inclusive words like "partner," "significant other" or "spouse" rather than gender-specific terms like "husband" and "wife."
>
> **DO** assume that LGBT employees and their allies are listening to what you are saying (whether you are in a meeting or around the proverbial water cooler) and will read what you've written (whether in a casual email or in a formal document), and make sure the language you use is inclusive and respectful.
>
> **DO** talk in staff meetings about why diversity is important to you as a manager, and make it clear you define diversity to include both sexual orientation and gender identity....
>
> **DO** acknowledge important events in an LGBT employee's life — e.g., same-sex marriage.... — in the same way you would for a heterosexual employee....
>
> **DON'T** judge or remain silent. Silence will be interpreted as disapproval.[13]

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[13] DOJ Pride, "LGBT Inclusion at Work: The 7 Habits of Highly Effective Managers," 1–2, http://www.lc.org/media/9980/images/pr_doj_lgbt_directive_052113.pdf (last visited Mar. 18, 2015) (color in original).

C. For a cautionary tale, this Court should look to other English-speaking nations that have legalized same-sex marriage.

The Anglosphere includes several nations with similar legal traditions and historical commitments to the Freedom of Speech. Two nations legalized same-sex marriage and shortly thereafter witnessed a free speech "parade of horribles."

In 2005, Canada legalized same-sex marriage. Shortly thereafter, Canadian officials sought to silence religious dissenters who disagreed with the Government's new sexual orthodoxy:

- The Nova Scotia Barristers Society and the Law Society of Upper Canada refused to accredit law degrees awarded by Trinity Western University because of its religious views on marriage and sexuality.[14]

- The Catholic Diocese of Whitehorse was forced to remove Roman Catholic Church teaching on same-sex sexual conduct from its student pastoral care manuals.[15]

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[14] Jaan Lilles, *Nova Scotia Barristers Society without Jurisdiction to refuse Trinity Western University grads*, LEXOLOGY (March 5, 2015), http://www.litigate.com/nova-scotia-barristers-society-without-jurisdiction-to-refuse-twu-grads; *see also Trinity W. Univ. v. NSBS*, 2015 NSSC 25 (Can.).

[15] Patrick Craine, *Bishop obeys gov't order to remove Catholic school teaching on sinfulness of homosexual acts*, LIFE SITE NEWS (October 18, 2013), https://www.lifesitenews.com/news/bishop-obeys-govt-order-to-remove-catholic-school-teaching-on-sinfulness-of.

- The Canadian Broadcast Standards Council adjudged that *Word TV* host Charles McVety breached Equitable Portrayal Codes after he stated on air that same-sex marriage was "sinful," criticized Toronto's same-sex pride parade, and dissented from Ontario's same-sex curriculum for public school children.[16]

- Teacher Chris Kempling was suspended and charged with professional misconduct for writing an editorial and penning private letters expressing his views on "monogamous" sexual relations and sexuality.[17]

In 2013, the Parliament of the United Kingdom passed the Marriage (Same Sex Couples) Act, which took effect on March 29, 2014. In a matter of months, religious dissenters were targeted for failure to conform to "British values":

- British Government schools inspectors have closed two Christian schools for teaching and preaching against same-sex sexual conduct.[18]

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[16] Mags Storey, *CTS Drops McVety Over Controversial Remarks*, CHRISTIAN WEEK (MARCH 1, 2011), www.christian week.org/cts-drops-mcvety-over-controversial-remarks/; *see also* CITS-TV *re Word.ca* and *Word TV*, CBSC Decision 08/09-2142 & 09/10-0383+ (Decided June 22, 2010).

[17] Kris Wells, *Poisoning the School Environment*, The Alberta Teachers' Association, www.teachers.ab.ca/Publications/ATA Magazine/Volume2086/Number203/Articles/Pages/PoisoningtheSchoolEnvironment.aspx (last viewed Mar. 18, 2015).

[18] Hilary White, *UK Gvmt to Faith Schools: Promote Homosexuality and Other Religions or Face Closure,* LIFE SITE NEWS (February 2,

- United Kingdom's Equality Commission reports that most Christians are frightened to speak their beliefs in the workplace.[19]

The freedom to speak according to religious conscience is essential to the dignity of each person and to the stability of our self-governing Republic. These core First Amendment principles cannot peacefully coexist alongside Government speech codes designed to enforce a superficial and false conformity of belief. Instead, the Free Speech Clause protects a noisy, crowded, and vibrant marketplace of ideas, populated with both supporters and opponents of same-sex marriage.

A decision from this Court imposing same-sex marriage on the States would "tilt the playing field" even more decisively against persons of faith who will continue to believe what they believe about marriage. As the examples above show, politically powerful advocates of same-sex marriage would likely use this Court's decision as a weapon to marginalize persons of faith who will continue to adhere to their millennia-old definition of marriage as the sacred union of one man and one woman. That in turn would lead to countless additional violations of the Free Speech Clause.

2015), https://www.lifesitenews.com/news/uk-gvmt-to-faith-schools-promote-homosexuality-and-other-religions-or-face.

[19] Steve Doughty, *Christians ARE Too Scared to Admit Beliefs – Because they Fear Being Mocked or Treated like Bigots, say Equality Chiefs*, THE DAILY MAIL (March 11, 2015), http://www.dailymail.co.uk/news/article-2990678/Christians-scared-admit-beliefs-fear-mocked-treated-like-bigots-say-equality-chiefs.html.

CONCLUSION

Millions of Christian ministers, teachers, and leaders are compelled by faith and conscience to preach and speak aloud their millennia-old and sincerely held religious view that marriage is the sacred union of one man and one woman. This Court should affirm the decision below — in part to protect the First Amendment rights of those who disagree with same-sex marriage. In so doing, this Court should reaffirm that the Free Speech Clause of the First Amendment protects religious dissenters who disagree with same-sex marriage and to reaffirm the importance of free debate and free inquiry in this democratic Republic.

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